IN THE

Supreme Court of the United States.

THE SPANISH SMACK *Paquete Habana*, JUAN PASOS, Claimant, *Appellant.*	No. 395.
THE SPANISH SCHOONER *Lola*, TOMAS BETANCOURT, Claimant, *Appellant*, *v.* THE UNITED STATES.	No. 396.

Brief on Behalf of Captors in Support of Decrees of Condemnation.

The brief filed by the Assistant Attorney-General on behalf of the United States in this case discusses very fully the status of the vessels in question in these cases. This point is covered by the second assignment of error (Record in No. 395, p. 21; in No. 396, p. 16).

We now beg leave to submit some remarks on the third assignment of errror (Record in No. 395, p. 21; in No. 396, p. 16), which is in the following words:

"Third. For that the court omitted and refused to hold that the vessels and cargoes were the property of Cubans, whose freedom and independence was recognized by the joint resolution of Congress approved April 20th, 1898, and entitled accordingly to exemption from capture as the property of neutrals, or persons entitled to the rights, privileges, and immunities of neutrals."

By this assignment it is understood that learned counsel for appellants maintain that property belonging to citizens and residents of the Island of Cuba can not be

regarded as impressed with a hostile character since the 20th of April, 1898, upon which day it was enacted by joint resolution No. 24, 30 Stat. L. 738, par. 1, "that the people of the Island of Cuba are, and of right ought to be, free and independent."

The exact legal status of the Island of Cuba in international law since the destruction of Spanish authority there may not be easy of definition. The rule of international law, however, as to the enemy character as impressed upon property is an exceedingly practical one. It attributes the character of enemy property to that property which is owned by one domiciled in the enemy country, even though his personal citizenship may be neutral. So, too, the property of a house of trade established in the enemy's country is regarded as hostile, even though some or all of the partners are citizens, and even residents, of a neutral state. The character, too, of the country where the property belongs is regarded as hostile or otherwise, not according to the exact legal character of the sovereignty of the country, but in accordance with its actual occupation and control. This rule and its reason are nowhere better stated than by Hall, International Law, § 167, from which we quote:

"With these reasons of a merely practical nature the effects of sovereignty, or in other words, of the authority which a state exercises over foreigners within its territory, combine to prevent the attribution of enemy character from corresponding exactly with the fact of national character. A foreigner living and established within the territory of a state is to a large extent under its control; he can not be made to serve it personally in war, but he contributes by way of payment of ordinary taxes to its support, and his property is liable, like that of subjects, to such extraordinary subsidies as the prosecution of a war may demand. His property being thus an element of strength to the state, it may reasonably be treated as

hostile by an enemy. Conversely, when the foreigner lives in a neutral country, he is so far subject to its sovereignty that it can restrain him from taking advantage of its territory to do acts of hostility against the enemy of his state, and it is responsible for his acts, if he does them. For the purposes of the war, therefore, he is in reality a subject of the neutral state. Finally, if property be regarded separately, although on the one hand it can not escape from the consequences of enemy ownership, it may, on the other, be necessarily hostile by its origin irrespectively of a neutral national character of its owner, and it is also capable of being so used in the service of a belligerent as to fall completely under his control, and to become his for every purpose of his hostilities."

This principle was applied in this court in the case of *Thirty Hogsheads of Sugar* v. *Boyle*, 9 Cranch, 191. The Island of Santa Cruz, belonging to Denmark, was subdued and occupied during the War of 1812 by the British. It was afterwards restored to Denmark, and Great Britain never held any rights in it except those of military occupation. The property in question in the case was the produce of the island, and belonged to a subject of Denmark, who withdrew from the island when it became British and therefore could not be considered personally hostile. Chief Justice Marshall in delivering the opinion of the court said (p. 195):

"Some doubt has been suggested whether Santa Cruz, while in the possession of Great Britain, could properly be considered as a British island. But for this doubt there can be no foundation. Although acquisitions made during war are not considered as permanent until confirmed by treaty, yet to every commercial and belligerent purpose, they are considered as a part of the domain of the conqueror, so long as he retains the possession and government of them. The Island of Santa Cruz, after its capitulation, remained a British island until it was restored to Denmark."

In accordance with this view the property was condemned as enemy property.

A similar view was taken by this court in prize cases arising out of the Civil War. In the *Prize Cases*, 2 Black, 635, it was said of the territory held by the insurrectionary government (p. 674):

"All persons residing within this territory whose property may be used to increase the revenues of the hostile power are, in this contest, liable to be treated as enemies, though not foreigners. They have cast off their allegiance and made war on their government, and are none the less enemies because they are traitors.

"But in defining the meaning of the term 'enemies' property,' we will be led into error if we refer to Fleta and Lord Coke for their definition of the word 'enemy.' It is a technical phrase peculiar to prize courts, and depends upon principles of public policy as distinguished from the common law.

"Whether property be liable to capture as 'enemies' property' does not in any manner depend on the personal allegiance of the owner. 'It is the illegal traffic that stamps it as 'enemies' property.' It is of no consequence whether it belongs to an ally or a citizen. (8 Cr. 384.) The owner, *pro hac vice*, is an enemy.' (3 Wash. C. C. R. 183.)

"The produce of the soil of the hostile territory, as well as other property engaged in the commerce of the hostile power, as the source of its wealth and strength, are always regarded as legitimate prize, without regard to the domicile of the owner, and much more so if he reside and trade within their territory."

And the same principle was applied in the case of The *Cheshire*, 3 Wall. 231, where the property of a house of trade established at Savannah, Georgia, was held subject to condemnation as enemy property, although some of the partners were citizens and residents of Great Britain.

The application of these principles to property owned

in Cuba during the late war with Spain removes all doubt as to the status of such property. Cuba was in fact hostile territory. It was so treated by our Government throughout. Paragraph 2 of the same joint resolution upon which reliance is placed as declaring the independence of Cuba, declares (30 Stat. L. 738):

"Second. That it is the duty of the United States to demand, and the Government of the United States does hereby demand, that the Government of Spain at once relinquish its authority and government in the Island of Cuba and withdraw its land and naval forces from Cuba and Cuban waters."

This provision recognizes an existing authority and government on the part of Spain in the Island of Cuba.

Paragraph 3 of the same resolution provided (30 Stat. L. 339):

"Third. That the President of the United States be, and he hereby is, directed and empowered to use the entire land and naval forces of the United States, and to call into the actual service of the United States the militia of the several States, to such extent as may be necessary to carry these resolutions into effect."

Thus it was recognized that force would be required to dislodge the existing Spanish authority and government in Cuba. The refusal of Spain to accede to the demand for the relinquishment of her authority was on the next day followed by the outbreak of war as declared by act of April 25, 1898, 30 Stat. L. 364. The proclamations of blockade of the ports of Cuba, dated April 22, 1898, and June 27, 1898, 30 Stat. L. 1769, 1776, were justifiable only as war measures, and proceed throughout upon the theory that Cuba is hostile territory. Spain's authority in fact continued in the island, and was recognized by our Covernment as continuing, until the pro-

tocol of August 12, 1898, 30 Stat. L. 1742, by Article I of which Spain agreed to "relinquish all claim of sovereignty over and title to Cuba"; and by Article IV agreed to "immediately evacuate Cuba, Porto Rico and other islands *now under Spanish sovereignty* in the West Indies." The evacuation of the island was to be arranged in all its details under provisions made in the same article (IV) of the protocol, 30 Stat. L. 1743, as well as by Article I of the treaty of peace of December 10, 1898, 30 Stat. L. 1754, 1755.

Calvo Droit International, 5th edition, Vol. IV, Book 2, section 2, in treating of enemy character makes these remarks, which we quote and translate as applicable to the case:

"§ 1950. It should, however, be observed that in principle the cession of a portion of territory by way of treaty does not destroy of right and instantly the national character and the bonds of political allegiance. This double change is only legally realized at the moment of the delivery and the receipt effected in the solemn forms usual in similar cases of territory ceded by treaty.

"§ 1951. This principle was applied by the British Court of Admiralty to the capture made by an English cruiser shortly after the cession of Louisiana by Spain to France of a vessel belonging to a merchant of New Orleans, which was entitled to be regarded as enemy property if its owner was a French subject and as neutral property if its owner was still a Spanish subject. The judge, Sir William Scott, decided that the capture should be invalidated and the ship restored to her owner, on the ground that there did not exist sufficient and satisfactory proof of the actual delivery to any French authority of the ceded territory, this delivery not yet having been surrounded with the formalities legally required."

The reference in this passage is to the case of The *Fama*, 5 C. Rob. 106, where the grounds of the decision are thus summarized (p. 118): "I am of opinion, therefore, that

on all the several grounds of reason, of practice and judicial recognition until possession was actually taken the inhabitants of New Orleans continued under the former sovereignty of Spain."

This principle precisely covers the case before the court, for, no matter how grievous were the wrongs done by Spain in the Island of Cuba, nor how well founded were the grounds for the interposition of our government for the removal of the Spanish yoke, yet in point of fact the Spanish dominion still continued there at the date of these captures, and all marine property having its situs in the ports of the island was under Spanish control and capable of being made available by the Spanish authorities for hostile purposes. It is this practical situation of the property to which international law alone looks as determining its character. That character being hostile, the property was rightly condemned, and it is submitted that the decrees to that effect should be affirmed.

GEORGE A. KING,
WILLIAM B. KING,
Solicitors for Certain Captors.

No. 395 & 396.

Brief of Captors

Supreme Court of the United States.

OCTOBER TERM, 1899.

Filed Nov. 7, 1899.

THE SPANISH SMACK "PAQUETE HABANA," JUAN PARSON, CLAIMANT, APPELLANT,
vs.
THE UNITED STATES. } No. 395.

THE SPANISH SCHOONER "LOLA," TOMAS BETENCOURT, CLAIMANT, APPELLANT,
vs.
THE UNITED STATES. } No. 396.

Appeal from the District Court of the United States for the Southern District of Florida.

BRIEF FOR THE CAPTORS.

JOS. K. McCAMMON,
JAMES H. HAYDEN,
Of Counsel for Captors.

WASHINGTON, D. C.:
GIBSON BROS., PRINTERS AND BOOKBINDERS.
1899.

Supreme Court of the United States.

OCTOBER TERM, 1899.

THE SPANISH SMACK "PAQUETE HABANA," JUAN PASOS, CLAIMANT, APPELLANT, *v.* THE UNITED STATES. } *No.* 395.

THE SPANISH SCHOONER "LOLA," TOMAS BETANCOURT, CLAIMANT, APPELLANT, *v.* THE UNITED STATES. } *No.* 396.

BRIEF FOR CAPTORS.

These are appeals from decrees of the District Court of the United States for the Southern District of Florida, by which the Spanish vessels *Lola* and *Paquete Habana* were condemned as prizes of war. By stipulation of the parties made with the approval of the prize court, it was agreed that the case of one other vessel, condemned, should abide

by the result of the appeal in the case of the *Paquete Habana*, and that the disposition of nine other vessels, condemned, should abide by the result in the case of the *Lola*.

STATEMENT OF FACTS.

The "Paquete Habana."

This vessel was owned by Justa Galban, a Spanish subject and a resident of Havana. She sailed under the Spanish flag and had a fishing license issued by the Spanish government (pp. 9 and 10). Her master and crew, consisting of two seamen, were Spanish subjects and residents of Havana. Her length was about 43 feet and her burden 25 tons. For several years she had been engaged in fishing in the Gulf of Mexico. In accordance with what appears to have been a custom prevailing in this business, the crew on each voyage divided the catch with the owner, two-thirds of it going to the crew and one-third to the owner. Customarily the voyages of the *Paquete Habana* had begun at Havana and, after proceeding to the fishing grounds and making her catch, she would return thither to sell her fish. Her last voyage began at Havana, on March 25, 1898. She proceeded to Cape San Antonio, the western extremity of Cuba, and remained in its vicinity fishing for twenty-five days; then started on her return to Havana with a cargo of about forty quintals, or 8,816 pounds, of fish. On April 25th she was captured by the U. S. S. *Castine*, eleven miles off Havana, while steering her course for that port, and was sent to Key West in charge of a prize crew.

She and her cargo were libeled on May 13. No claim was presented on behalf of the owners. The cause was

heard upon the libel and the deposition of Juan Pasos, her master, which had been taken *in preparatorio* and a decree of condemnation was entered on May 26. On May 28, Pasos appeared for the owners of the vessel and her cargo, and on his motion this decree was set aside and leave given the claimant to file a claim and test affidavit. The case was heard on May 30 and a second decree of condemnation entered. Pursuant to the order of the court, she was sold at public auction for $490, which sum was deposited with the Assistant Treasurer of the United States at New York, to be disposed of according to law (p. 16).

THE "LOLA."

This was a Spanish vessel owned by Severo Gonzales, a Spanish subject and a resident of Havana. She sailed under the Spanish flag, but had no patent or license. Her crew consisted of a master and six seamen, all residents of Cuba, and all Spanish subjects. Her length of keel was given by the master as 51 feet. In his deposition taken *in preparatorio*, he gave her burden as 55 tons (p. 9). Subsequently, in his test affidavit (p. 13), he placed it at 35 tons. For some years the *Lola* had been engaged in fishing in the Gulf of Mexico. On such voyages it had been customary for the owner and crew to divide the vessel's catch, two-thirds going to the crew, and one-third to the owner. She had sailed from Havana and returned thither to sell her fish. Her last voyage began at Havana on the 11th of April, 1898. She proceeded to Campeche Sound, off the peninsula of Yucatan, and remained there fishing for eight days (p. 13). Her catch amounted to about 10,000 pounds. With this cargo, she started on her return voyage to Havana. On April 26 she was stopped by the U. S. S. *Cincinnati*, and warned

not to attempt to enter that port. She then changed her course and on April 27 was steering for Bahia Honda when captured by the U. S. S. *Dolphin*, and sent to Key West in charge of a prize crew. She and her cargo were libeled on May 18, 1898. No claim was presented on behalf of the owners of the vessel or cargo. The case was heard upon the libel and the deposition of Tomas Betancourt, her master, taken *in preparatorio*, and a decree of condemnation was entered. On May 28 this decree was set aside on motion of the present claimant, who appeared on behalf of the owners. After hearing, a second decree of condemnation was entered (p. 14). The vessel was sold pursuant to an order of court, for $800, which sum was deposited with the Assistant Treasurer of the United States at New York, to the credit of the prize court (p. 15).

In both cases the claimants contend that the prize court erred in declining to rule: (1) That under the terms of the President's proclamation of April 26, 1898, fishing vessels were exempt from capture as prize of war: (2) That under the terms of the joint resolution of the United States Senate and House of Representatives, approved April 20, 1898, which recognized the freedom and independence of Cuba, the vessels and their cargoes were the property of neutrals or persons entitled to the rights, privileges, and immunities of neutrals, and (3) In refusing to order further proofs.

ARGUMENT.

I.

No provision of the President's proclamation of April 26, 1898, extended to enemy vessels like the "Lola" and the "Paquete Habana" exemption from capture.

The claimants base their plea of immunity from capture upon the second paragraph of the preamble of the proclamation. This recited that

> "Whereas it being desirable that such war be conducted upon principles in harmony with the present views of nations and sanctioned by recent practice, it has already been announced that the policy of this Government will not be to resort to privateering, but to adhere to the rules of the Declaration of Paris."

It is evident that the President did not intend to set out in the preamble the rules prescribed for the conduct of the war. It merely stated the motive which prompted the adoption of the rules declared and proclaimed in the six articles of the proclamation. None of these dealt with the treatment of fishing smacks and coasting vessels. They were left to share the risks and liabilities of belligerents, along with other enemy property, found upon the high seas.

In some instances the navies of belligerent states have not made captures of small open boats, engaged in fishing, close to the enemy's coast. This course has been adopted from motives of expediency as well as humanity. The value of such small craft, with their catches of fish or cargoes, is insignificant. Naval warfare is usually waged

at a considerable distance from home ports, and in the great majority of cases it would be impossible to send in the captured boats for adjudication. The expense and annoyance incident to so doing would more than counterbalance the proceeds of the prizes. Such boats would hardly prove important to the enemy in the way of carrying supplies or information. Again, small open boats are most often owned by fishermen who sail them in person, and to whom they represent the only means of getting a livelihood. To carry the owner to a distant country in the capacity of a captured crew, and, after getting his deposition, to turn him adrift with no means of returning home or of supporting himself and his family in case he should make his way back, would be a pitiful thing indeed.

These reasons do not apply to vessels like the *Lola* and the *Paquete Habana*, which are most nearly comparable to the American, British, and French vessels which compose the fishing fleet of the Grand Bank and the coasts of Newfoundland and Labrador. They were staunch, seaworthy vessels, capable of keeping the sea for weeks at a time, and engaged in making voyages of from three to eight hundred miles. They could have been sent in for adjudication to any port of the United States or of Europe. In neither case did the owner of the vessel take part in her active management, but chartered her for a share of her prospective catch; thus she represented an income-producing investment rather than a sole means of enabling the owner to utilize his labor and gain a livelihood.

In the appellant's brief we find passages quoted from the writings of many well-known students of International Law. These advocate the adoption of a rule of war which will give immunity from capture to small boats employed

in fishing along an enemy's coast. All recognize the distinction between coast fishing and deep-water fishing. None of them go so far as to advocate immunity for vessels employed in the latter. Proclamations, orders in council and treaties cited tend to show that the immunity of coast fishermen is generally recognized by the nations of the continent of Europe. It appears, however, that no such doctrine has been adopted by Great Britain, whose policy in war most closely resembles that adopted by the United States.

In the case of the *Young Jacob*, 1 *C. Rob.* 20, Lord Stowell said that the immunity of coast fishermen from capture was a matter of comity or grace, and not one of right. The *Young Jacob*, which was a small fishing vessel, was condemned as prize, but subsequently was released pursuant to an order in council. This order in nowise affected the validity or the propriety of Lord Stowell's decree. It was an act of grace which it was competent for the executive alone to grant. The court was bound to follow the law.

The cases at bar must be adjudicated in accordance with the laws in force during the late war with Spain. No proclamation has ordered the release of the vessels in question or of vessels of their class. The opinions of European writers and executive action, taken in individual cases, do not possess any value as authorities. It was said by Professor Woolsey, in a recent lecture upon international law (Yale L. J., June, 1899:)

> "Others give it the name of law, but refuse to give it that character—in fact, tend to deprive it of all character—by spinning its rules out of their own brains and putting their own ideas of what should be law alongside the rules which have bound States for generations, on terms of perfect equality.

"This sort of animal is apt to be a continental jurist and is profoundly contemned by the man bred under the common law of England and the United States, with a wholesome respect for precedents and judicial decisions. He in turn may serve his mistress badly, if he falls back, hide-bound, upon the lessons of the past, its accepted rules, its unquestioned usages, its century old laws, with never an attempt to better or amend or replace what has been outgrown. Formalist, theorist, critical jurist, each has his value, but to get that value out you must roll the three together and mingle their methods, as you rub your salt, and oil, and vinegar into one smooth resultant.

"Thus, the Austinian critic is wrong, because he does not account for the facts in the case; he does not explain the existence of a body of international rules and usages by which States in their intercourse are, and agree to be governed, but which are far wider and more extensive than the sum of their treaty agreements.

"So is the theorist wrong, because he sets up his wishes and fancies as law and fact. Were his method right, there could be, and probably would be, as many different bodies of International Law as there are jurists."

The blockade of Havana and the northern coast of Cuba had been established pursuant to the President's proclamation of April 22, 1898, and was actual and effective when these vessels were intercepted, both steering for Havana and carrying thither large cargoes of food, a supply which the establishment of the blockade was intended to exclude, and which the maintenance of the blockade was likely to render most necessary to the Spanish garrison and the citizens who remained loyal to Spain. The object of war, and especially naval warfare, being to cripple the enemy's commerce and cut off its supplies, such captures as these are justifiable and proper.

II.

The joint resolution of the Senate and House of Representatives approved April 20th, recognizing the rightful and actual independence af the people of Cuba, did not and could not change the allegiance of any person who elected to remain loyal to Spain, or change the nationality of a vessel whose owner elected to sail her under the Spanish flag.

After a recital of the circumstances and conditions which impelled Congress to act, the resolution provided:

> "First. That the people of the island of Cuba are and of right ought to be free and independent; that it is the duty of the United States to demand, and the Government of the United States does hereby demand, that the Government of Spain at once relinquish its authority and government of the island of Cuba and withdraw its land and naval forces from Cuba and Cuban waters. . . .
>
> "Third. That the President of the United States be and he hereby is directed and empowered to use the entire land and naval forces of the United States and to call into the actual service of the United States the militia of the several states, to such extent as may be necessary to carry these resolutions into effect; that the United States hereby disclaims any disposition or intention to exercise sovereignty, jurisdiction and control over the said island, except for the pacification thereof, and asserts its determination, when that is accomplished, to leave the Government and control of the island to its people."

A foreign power certainly cannot change the allegiance of an individual against his will. It cannot be seriously argued that, by virtue of the resolution, all residents of

the island of Cuba ceased to be loyal subjects of Spain, irrespective of their wish in the matter The right of each citizen to transfer his allegiance was recognized, and also the right of transferring it in the future, but his actual allegiance at any particular time was a matter to be determined by his own choice. His choice could be evidenced only by his conduct.

Although the Cuban insurrection had been in progress for three years, the owners of both of the vessels and their cargoes had retained their residences in Havana, the seat of the Spanish government of the island and the headquarters of its military operations.

It has been held that a long continued retention of residence within territory controlled and governed by a hostile power is conclusive evidence of a person's adherence to the hostile government.

> *The Peterhoff*, 5 *Wall.* 28: "It has been held by this court that persons residing in the rebel States at any time during the Civil War must be considered as enemies during such residence, without regard to their personal sentiments or dispositions."
>
> *Prize Cases*, 2 *Black*, 666, 687.
>
> *Mrs. Alexander's Cotton*, 2 *Wall.* 404.
>
> *The Venice*, 2 *Wall.* 258.

Throughout the Cuban insurrection the *Paquete Habana* and the *Lola* had continued to sail under the Spanish flag and to carry their cargoes, not to ports of neutral states or to ports held by the Cuban insurgents, but to Havana. The conduct of the owners and the admission of both claimants that all concerned were loyal Spanish subjects, proves conclusively that at the time of capture, the vessels and cargoes were Spanish and were subject to capture and condemnation as enemy property.

III.

The prize court would not have been justified in ordering of further proofs, and it would have been error had the prize court so done.

The authorities are uniform in saying that a prize court is not justified in ordering further proof where there is no doubt with regard to the facts, and that such an order should only be made where the ends of justice clearly demand it. The ordering of further proof rests in the sound discretion of the court. In the present case, no issue of fact was or could be raised.

The appellants do not set up rights, but ask charity and forbearance from the United States. We submit that while this might have been extended to them by the executive, a court must administer the law as it exists.

JOS. K. McCAMMON,
JAMES H. HAYDEN,
Of Counsel for the Captors.